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IN THE

United States Supreme Court

October Term 1965

No. 435

HERMAN BERMAN, Individually and trading as SCOTT CONSTRUCTION COMPANY; FRANKLIN ELECTRIC COMPANY; MODERN FLOORS, INC.; JENKINS ELEVATOR AND MACHINE COMPANY; WESTINGHOUSE ELECTRIC SUPPLY COMPANY, (a division of WESTINGHOUSE ELECTRIC COMPANY); GENERAL ELECTRIC SUPPLY COMPANY, AND HOTPOINT (both divisions of GENERAL ELECTRIC COMPANY),

Petitioners,

v.

SEYMOUR HERRICK and ABRAHAM KAMBER, individually and trading as LEWIS TOWER BUILDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO.

HERMAN BERMAN, Individually and trading as SCOTT CONSTRUCTION COMPANY; FRANKLIN ELECTRIC COMPANY; MODERN FLOORS, INC.; JENKINS ELEVATOR AND MACHINE COMPANY; WESTINGHOUSE ELECTRIC SUPPLY COMPANY, (a division of WESTINGHOUSE ELECTRIC COMPANY); GENERAL ELECTRIC SUPPLY COMPANY, AND HOTPOINT (both divisions of GENERAL ELECTRIC COMPANY),

Petitioners,

v.

SEYMOUR HERRICK AND ABRAHAM KAMBER, individually and trading as LEWIS TOWER BUILDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herman Berman, individually and trading as Scott Construction Company, Modern Floors, Inc., Jenkins Elevator and Machine Company, Westinghouse Electric Supply Company, General Electric Supply Company, and Hotpoint, petitioners, pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on May 11, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in appellants' appendix, pp. 221a-230a is reported in 231 F. Supp. 918 (1964). The opinions, orders and judgment of the Circuit Court of Appeals, printed in appendix hereto, infra, pp. 14 - 17 are reported in F.2d (1965).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in May 11, 1965. Rehearing was denied on June 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. May the Circuit Court of Appeals sanction fundamental error attributable to the district court judge, who halted abruptly all further cross-examination of a crucial witness, with a statement that is not necessary to consider the underlying equities of the case because plaintiffs had failed to present enough evidence to sustain an award of damages?

2. May the Circuit Court of Appeals ignore the entire line of decisions in the Commonwealth of Pennsylvania dealing with unjust enrichment in reaching the conclusion that regardless of the facts and equities of the case, the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages, when plaintiffs allege and prove facts sufficient to warrant a finding of fraud.

STATEMENT OF THE CASE

This is an action based on the quasi-contractual theory of unjust enrichment by several contractors and materialmen against the general partners of a limited partnership which owned a large Philadelphia office building. The plaintiffs seek to recover the value of the improvements to the building made by them pursuant to their contracts with defendants' lessee, a corporation which was in possession of the building at the time the improvements were made.

The plaintiffs contend that the conduct of an individual who was both the general manager of the limited partnership which owned the building and president and substantial stockholder (these shares were obtained for a nominal consideration) of the corporation which leased the building provided an equitable basis for imposing a liability upon the owners of the building who are the defendants in this case.

The evidence produced shows that the lessee had contracted to pay the plaintiffs sums aggregating approximately $240,000 for labor and material, but paid them only $130,000 leaving an unpaid balance of approximately $110,000. Thereafter, the lessee defaulted upon its obligations to lessor under the lease and the latter terminated the leasehold. A few months later finding the party with whom they had contracted insolvent, and the owners in the possession of the building, the plaintiffs filed this suit against the owners of the building for the cost of their improvements.

The case was tried by a court sitting without a jury. During the trial, the court halted abruptly all cross-examination of one of defendant's most important witnesses, an attorney who represented both the defendants and the individual who was the general manager of

the defendants' partnership, and president and 50 percent owner of the stock of the lessee corporation.

When the trial concluded, the court found no factual basis for the plaintiffs' claim that a relationship existed between the defendants and that individual sufficient to impose a liability upon the defendants under the theory of unjust enrichment.

The matter was appealed to the Court of Appeals for the Third Circuit and the plaintiffs claimed that: (1) the trial court did not properly apply Pennsylvania law (2) the trial court's findings were clearly erroneous in view of the undenied testimony presented at the time of trial and (3) the trial court committed fundamental error in halting all cross examination of the witness for the defense whose testimony was crucial to the issues involved.

The Court of Appeals, in its opinion, categorically refused to consider the errors during the trial of which plaintiffs complained since that court stated:

> "the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages."

The plaintiffs filed a petition with the Court of Appeals for re-hearing, stating in detail where that court had misapplied the Pennsylvania law, a ruling which in effect emasculated the entire doctrine of an unjust enrichment as promulgated in Pennsylvania court decisions. Plaintiffs also reminded the court that fundamental error had been committed during the trial of the case when the trial judge improperly halted all plaintiffs' cross examination of a crucial witness for the defendants. The petition for re-hearing was denied. This petition for certiorari is taken

seeking review of the ruling of the Court of Appeals denying the petition for re-hearing and the affirmation of the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The proceedings in this case have departed from the accepted and usual course of judicial proceedings in the Third Circuit when the right of cross examination was denied counsel for the plaintiff. The Court of Appeals while admitting by implication such a denial existed sanctioned it by stating in its opinion that the equities of the case need not be considered because of a purported omission in the plaintiffs' case regarding proof of damages which holding is contrary to applicable Pennsylvania decisions.

2. The Circuit Court of Appeals has rendered a decision that is in such conflict with applicable Pennsylvania decisions that this decision effectually destroys the law of unjust enrichment in Pennsylvania which has been carefully built up by Appellate Court decisions in Pennsylvania, based on the Restatement of Restitution.

DISCUSSION OF REASONS FOR GRANTING WRIT

1. The Circuit Court erred in not granting a new trial for the reason that fundamental error was committed during the trial of this case by the trial judge who abruptly halted all of plaintiffs' cross examination of a crucial witness for the defendants.

The basic right of any party is the right to cross examine an opposing party's witness. The denial by a court of this right to any party is fundamental error.

Alfred v. United States, 282 U.S. 687 (1930). The District Court during the trial of this case stopped all cross examination of a crucial witness for the defense. The court then compounded this error by relying on this witness's testimony to support its findings of facts.. Cross examination was never completed because of the following discussion, taken from the record at page 209a.

> "THE COURT: We have had enough of this cross-examination. We will stop at this point.
> MR. LASHNER: Exception, Your Honor.
> THE COURT: Yes.
> MR. GOFFMAN: Are you finished?
> MR. LASHNER: Yes.
> MR. GOFFMAN: Do you have any other areas of cross-examination? I don't think His Honor intended to cut you off.
> THE COURT: Yes, I did" (R209a).

(Plaintiffs' counsel's affirmative reply to defendants' counsel's [Mr. Goffman's] question that he was finished was made only in obedience to the ruling of the court stating that all further cross examination was prohibited.)

This ruling by the court was fundamental error. Even defendants' attorney recognized this and tried to influence the court to change its ruling. The trial judge remained adamant.

Of course, the bounds of proper cross examination are within the sound discretion of the trial judge, and the nature and character of the investigation of the subject under consideration and the demeanor of the witnesses are prime factors entering the court's determination of proper limits. But it is clear that in this case the court exceeded all proper limitation of cross-examination by prohibiting all further cross-examination of a witness on which he subsequently relied to substantiate his findings of fact. This reliance on the testimony of this crucial witness compounded the severity of the fundamental error committed at the time of trial which can be cured only by the granting of a new trial.

The Circuit Court in effect admitted that fundamental error was committed but stated in justification thereof:

> "...The plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case."

With this statement the Court of Appeals by indirection approved the fundamental error committed by the court below. To compound its error the Circuit Court improperly quoted Pennsylvania Law on the issue of proof of damages.

2. The Circuit Court did not apply Pennsylvania law to the factual issues of this case and rendered a decision that is in such conflict with that applicable Pennsylvania law that this Court's decision effectively destroys the law of unjust enrichment in Pennsylvania which has been carefully erected by Court decisions which have relied heavily and are in accord with the Restatement of Restitution.

The Court erred in holding that the plaintiffs' proof, on the issue of unjust enrichment, was insufficient to sustain an award for damages because the major basis for the Circuit Court's opinion is not consistent with Pennsylvania Law or with the holding in the case on which it relied. Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593 (1963).

The Supreme Court of Pennsylvania in that case stated at 450: (and the Circuit Court quoted from that opinion)

> "Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and, (2) an injustice resulting if recovery for the enrichment is denied . . . . In any event, appellant cannot merely allege its own loss as the measure of recovery—i.e., the value of labor and materials expended—but instead must demonstrate that appellee has in fact been benefited."[5]

This court adopted that holding, but did not see fit to adopt the footnote to that specific holding. Footnote 5 after the word "benefited" in the Supreme Court's opinion states this:

"5 Where the value of the benefit differs from the amount of the loss, and the recipient is free from fault, the amount of recovery is generally limited by the value of the benefit. See Restatement, Restitution §1, comment e (1936)." (Emphasis supplied.)

Section 1, comment e of the Restatement, Restitution provides:

"e. Where benefit and loss do not coincide. There are situations, however, in which a remedy is given under the rules applicable to this subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such a case, if the transferee was guilty of no fault, the amount of recovery is usually limited to the amount by which he has been benefited. Thus, if a person's chattels are incorporated into the land of another without the other's knowledge, the owner of the land is liable, if at all, only to the extent to which its value has been increased, although the value of the chattels was greater (see s42). The amount of recovery, however, is not invariably determined by the value of what has been received. In some cases the value of what is given is determinative, as where, because of fraud or breach of contract, services or chattels are given, the value of which is greater than the amount by which the recipient's estate has been increased (see §§151 and 152)." (Emphasis supplied.)

Further section 151 of the Restatement of Restitution states that:

> "Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it."

Section 152 of the Restatement of Restitution states that:

> "Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery, for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient."

This is the law of Pennsylvania. DeGasperi v. Valicenti, 198 Pa. Super. 455 (1962).

In the Meehan case it was admitted that the recipient of the benefit was free of any fault. On the other hand the basis of the plaintiffs' case is that the defendants were parties to the entire scheme and by their action through their agent caused these improvements to be made. Allegations to this effect were made and proof was submitted at the time of trial. Therefore, the instant case differs factually from the Meehan case on which the Circuit Court relied. The Circuit Court, in effect, stated a concept of law which the Pennsylvania Courts do not accept and which destroys the

basic concepts of the unjust enrichment doctrine that have been carefully erected by Pennsylvania judicial decisions.

Further, plaintiffs submitted in detail proof of their damages conforming to the standards set forth in previous Pennsylvania decisions.

CONCLUSION

All of the above argument was presented to the Circuit Court of Appeals either in the brief for appellants at argument or in the petition for rehearing. The Circuit Court rejected these arguments twice. By implication they have stated that the halting of all cross examination is proper. By specific decision they have enunciated a theory of law that is directly contrary to law of Pennsylvania. The District Court denied the plaintiffs their right to a day in court. The Circuit Court has affirmed that denial and compounded that error with reasons that are directly contrary to Pennsylvania law. For these reasons petitioners request that this court grant its petition for certiorari.

Respectfully submitted,

SAMUEL SACKS,
MELVIN LASHNER,
Counsel for petitioners

ADELMAN & LAVINE,
Of Counsel

Certificate of Counsel

We hereby certify that the foregoing petition is presented in good faith and not for delay.

SAMUEL SACKS
MELVIN LASHNER
Counsel for petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed May 11, 1965)

Argued March 16, 1965

Before: McLaughlin, Hastie and Smith, Circuit Judges.

By Hastie, Circuit Judge.

This is a suit, based solely upon the quasi-contractual theory of unjust enrichment, by several contractors and materialmen against the general partners of a limited partnership, which owned a large Philadelphia office building. Plaintiffs seek to recover the value of alleged improvements to the building made by them pursuant to their contracts with the defendants' lessee, a corporation which was then in possession of the building with an option to purchase it.

There was evidence that the lessee had contracted to pay the plaintiffs sums aggregating approximately $240,000 for labor and material. It paid them about $130,000, leaving an unpaid balance of about $110,000. The lessee defaulted upon its obligations to the lessor, and the latter lawfully terminated the leasehold. A few months later, finding the party with whom they had contracted insolvent, the plaintiffs filed this suit against the owners of the building. Subsequently, the defendants sold the building and in so doing sustained a loss of more than $800,000. This litigation involves no assertion of liens or rights in rem. Only a personal obligation of the defendants is claimed.

The case was tried to a court sitting without a jury.

On all of the evidence the court found no proper factual basis for the claim that, as between the contractors and the landlords, the latter had been unjustly enriched by the work done on their building solely at their lessee's behest and in reliance upon its promise to pay. On this appeal the contractors contend that the conduct of an individual, who was both a limited partner of the landlord partnership and a major stockholder and active participant in the ill-fated venture of the corporate lessee, provided an equitable basis for imposing personal liability on the landlords for any benefit they derived from the plaintiffs' work. The defendants contend both that the court was right in finding no equity in the plaintiffs' claim and that the plaintiffs failed to prove either the fact or any amount of the alleged "enrichment". We agree with the defendants that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case.

This is a diversity case arising out of Pennsylvania transactions, and Pennsylvania law determines what must be proved to sustain an award for unjust enrichment. In the recent case of Meehan v. Cheltenham Township, 1963, 410 Pa. 446, 189 A.2d 593, the Supreme Court of Pennsylvania denied recovery to a subcontractor against a landowner on the ground that the amount of the alleged economic benefit to the landowner, if any, had not been proved. The Court said:

> "Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied. . . . In any event, appellant cannot merely allege its own loss as

> the measure of recovery—i.e., the value of labor and materials expended—but instead must demonstrate that appellee has in fact been benefited." 410 Pa. 446, 449-450, 189 A.2d 593, 595.

Equally clear and to the same effect is the ruling in West v. Peoples First National Bank & Trust Co., 1954, 378 Pa. 275, 286, 106 A.2d 427, 433, that recovery for unjust enrichment "is limited to the value of the benefit to the other party derived from the performance . . . even though the sums expended or the value of the services rendered may be greater than the amount of such benefit conferred".

In the present case the plaintiffs undertook to prove the fair price of the work they performed, rather than how much the value of the building was increased by their labor and the materials they supplied and installed. They introduced in evidence their bills rendered to the lessee for various contractual undertakings; some for maintenance operations, others for such improvements as air conditioning units, and still others for renovations and subdivisions of space and the installation of special facilities to meet the needs of individual tenants. There was no evidence of any amount or amounts by which the value of the building was increased as a result of any of these undertakings. In this connection, it seems unlikely that the cost of continuing elevator maintenance, one of the items in evidence, added in any significant way to the value of the structure. The same is true of renovations, and partitioning and special installations to meet the specialized needs of particular tenants. On the other hand it seems likely that the "modernizing" of elevators and the installation of a number of air conditioning units resulted in some increase in the value of the building. And even though the defendants sold the building at a sub-

stantial loss, that loss might well have been greater except for some of the improvements in suit. However, on the present record the dollar value of any such economic benefit, and the extent of the contribution of any plaintiff's work to it, are wholly speculative. Thus, the plaintiffs' proof is inadequate to support any verdict in their favor under the above cited Pennsylvania rule that it is the benefit of work to the defendant, not the amount the plaintiff reasonably charged for its performance, which is recoverable in this kind of action.

Finally, we have not overlooked the plaintiffs' argument that rental income for the building increased $5000 per month as a result of their work. The record shows such an assertion in the opening statement of plaintiffs' counsel, and the trial judge alluded to this assertion in his opinion. But there is no proof that this occurred and, therefore, no basis for a finding in the plaintiffs' favor on the alleged increase in rental value.

Accordingly, the judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Present: McLaughlin, Hastie and Smith, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 6, 1964 in this case be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF

Clerk

May 11, 1965

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge; and McLAUGHLIN, KALDNER, STALEY, HASTIE, GANEY, SMITH, and FREEDMAN, Circuit Judges.

The petition for rehearing filed by Herman Berman, Individually and Trading as Scott Construction Co., Et Als., Appellants, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ William H. Hastie
Circuit Judge

Dated: June 10, 1965